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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

Estate of JOSHUA CLAYPOLE,
deceased, by and through SILVIA
GUERSENZVAIG, as Administrator;
SILVIA GUERSENZVAIG,

Plaintiff,

vs.

COUNTY OF SAN MATEO; SHERIFF
GREG MUNKS, in his individual and
official capacity; COUNTY OF
MONTEREY; SHERIFF SCOTT
MILLER, in his individual and official
capacity; SERGEANT E. KAYE, in his
individual and official capacity; CITY OF
MONTEREY; MONTEREY POLICE
DEPARTMENT CHIEF PHILIP PENKO,
in his individual and official capacity;
BRENT HALL, in his individual and
official capacity; CALIFORNIA
FORENSIC MEDICAL GROUP; DR.
TAYLOR FITHIAN, in his individual and
official capacity; COMMUNITY
HOSPITAL OF MONTEREY
PENINSULA; and DOES 1 through 30,

Defendants.

Case No: CV 14-02730 BLF
[Assigned to the Honorable Beth Labson
Freeman - Courtroom 3]

**PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR SANCTIONS AND TO
COMPEL DISCOVERY**

DATE: December 15, 2015
TIME: 10:00 a.m.
CRTRM: 5
JUDGE: Hon. Paul Grewal

*[Declaration of Joshua Piovia-Scott and
Exhibit filed concurrently herewith]*

Complaint Filed:	June 12, 2014
FAC Filed:	October 28, 2014
Discovery Cut-Off:	August 31, 2015
Motion Cut-Off:	January 14, 2016
Trial Date:	April 11, 2016

INTRODUCTION

Plaintiffs filed this Motion because: 1) Defendants California Forensic Medical Group and Taylor Fithian produced a broken DVD in response to Plaintiffs' requests for documents related to the opinions of their designated expert, and subsequently refused to produce responsive documents; and 2) the conduct of Defendants' lead counsel was part of an escalating and obstructive course of behavior that prejudiced Plaintiffs' ability to fairly obtain evidence through the discovery process. In response to Plaintiffs' Motion, Defendants did not file any opposition papers. Instead, Defendants filed a three-page declaration written by their lead counsel, Peter Bertling. The declaration perfunctorily addresses the requests for production, Mr. Bertling's sexist attack on Plaintiff's counsel, and Mr. Bertling's obstruction during deposition scheduling. This cursory response to allegations of serious misconduct exemplifies the dismissiveness and disregard with which Defendants and Mr. Bertling have approached Plaintiffs' counsel, the federal rules, and, by extension, this Court.

ARGUMENT

I. Mr. Bertling concedes that Defendants did not produce responsive documents.

In his declaration, Mr. Bertling makes no affirmative statement that all responsive documents were produced. Instead, he admits Defendants did not produce documents responsive to Plaintiffs' requests to Dr. Hayward, and still have yet to do so. Bertling Decl. ¶ 3 (noting that he "recently learned" of responsive documents that have yet to be produced).¹ On this basis alone, the Court should

¹ Mr. Bertling claims in his declaration that some of the responsive documents were reviewed by Dr. Hayward exclusively at the Monterey County Jail, and Hayward made no copies of these documents. Bertling Decl. ¶ 3. This assertion is troubling, as it suggests that Dr. Hayward relied upon documents which his attorneys cannot produce and which Defendants themselves do not have, despite Defendants being

1 compel production of documents and order that Defendants make Dr. Hayward
2 available for a deposition to inquire about his review of these materials and the
3 basis for his opinions. Without the opportunity to further depose Dr. Hayward
4 regarding the information he reviewed and relied upon in forming his opinions after
5 proper production, neither Plaintiff nor the Court can fairly evaluate Dr. Hayward's
6 opinions and report.

7 Mr. Bertling's assertion that "several of the requested documents had already
8 been produced during discovery in this litigation" does not satisfy Defendants'
9 obligations to respond fully to Plaintiffs' requests. Bertling Decl. ¶ 2; *see Haeger v.*
10 *Goodyear Tire & Rubber Co.*, 906 F. Supp. 2d 938, 976–77 (D. Ariz. 2012)
11 (holding it improper to object to document request by stating that some responsive
12 documents have already been produced). This is especially true given Defendants'
13 ever-shifting responses about what documents were intended by Dr. Hayward to be
14 produced on the DVD in the first instance, and what documents are responsive to
15 Plaintiffs' requests.

16 As stated in Plaintiffs' Motion, when Plaintiffs' counsel attempted to meet
17 and confer with Defendants' counsel regarding the documents on the broken DVD,
18 Defendants responded with just four documents, two of which were Plaintiffs'
19 expert disclosures. One day prior to the filing of Mr. Bertling's declaration in
20 opposition to this Motion, Defendants' counsel contacted Plaintiffs' counsel by
21 email stating that they intended to, but did not, produce 21 responsive documents
22 on the broken disc. *See* Ex. L. The following day, Mr. Bertling's declaration to the
23 Court made no mention of these 21 documents and referred only to Dr. Hayward's
24 notes that have suddenly surfaced. Despite these concessions, Defendants have not
25 produced any additional documents regarding Dr. Hayward's opinions since this
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28 hired by the County to perform the very functions that presumably are the subjects
of those documents. Plaintiffs are entitled to review all of these documents.

1 motion was filed on November 10, 2015.

2 Finally, Mr. Bertling mischaracterized the Court's August 18, 2015, ruling on
3 Plaintiffs' motion to compel as denying "much of what Ms. Rifkin requested."
4 Bertling Decl. ¶ 6. This Court granted all of the relief requested by Plaintiffs with
5 respect to Dr. Fithian's 30(b)(6) deposition and Mr. Bertling's improper
6 instructions not to answer, including ordering additional hours of deposition by Dr.
7 Fithian and ordering that Dr. Fithian answer Plaintiffs' questions regarding changes
8 in policies and procedures at Monterey County Jail, suicides at other jails, and
9 CFMG staff practices with respect to mental health treatment. Dkt. No. 92. The
10 Court also granted Plaintiffs' motion to compel production of documents in
11 significant part, ordering CFMG to produce documents related to suicides and
12 attempted suicides at a number of other CFMG-serviced jails. *Id.* The Court later
13 ordered Dr. Fithian to answer numerous questions that Mr. Bertling instructed him
14 not to answer during the mid-deposition hearing that Plaintiffs were forced to
15 request during Dr. Fithian's August 31, 2015, deposition. Dkt. No. 96.

16 **II. Sanctions for Mr. Bertling's sexist remarks are appropriate despite his**
17 **apology.**

18 Sanctions against Mr. Bertling are warranted in response to his sexist attack
19 on Plaintiffs' counsel. In his declaration, Mr. Bertling addressed his remarks on
20 Plaintiffs' counsel by stating: "I apologize to Ms. Rifkin if I offended her"
21 Bertling Decl. ¶ 4. This "non-apology apology" is inadequate, as it suggests his
22 conduct would have been appropriate had Ms. Rifkin not been offended. *See* Edwin
23 L. Battistella, *Sorry About That: The Language of Public Apology* (2014) ("Rather
24 than mutually exploring the offense as a prelude to an apology, the apologizer
25 makes a unilateral conditional apology: 'I apologize if you are offended' . . . and
26 places the onus on the offended party to say whether an offense has occurred.").
27 Instead of qualifying his conduct based on Ms. Rifkin's sensitivities, Mr. Bertling
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ought to appreciate that his sexist stereotyping is offensive to the Court and to the legal process—regardless of whether Ms. Rifkin was offended.

Monetary sanctions are appropriate where basic standards of professionalism and civility—not to mention a strict insistence on gender equality among the bar—have been flouted so egregiously.

III. Mr. Bertling does not contest his discovery misconduct.

Finally, Mr. Bertling’s declaration does not contest, or even address, the bulk of the discovery misconduct raised in Plaintiffs’ Motion, which includes:

1. Improper instructions not to answer deposition questions;
2. Coaching witnesses by answering deposition questions for them;
3. Coaching and suggesting testimony to witnesses through extensive speaking objections and editorial comments;
4. Coaching witnesses by pointing deponents to specific pages and information in documents during their answers;
5. Interfering with testimony by whispering to deponents during deposition testimony; and
6. Interfering with testimony by cutting off deponents in the middle of their answers.

Nor does Mr. Bertling address his untimely reversals of prior discovery agreements made by his co-counsel that subsequently required extensive time to be expended by Plaintiffs’ counsel. Rather, he cites his agreement to make prior employee witnesses available for deposition without a subpoena—omitting any mention that his co-counsel had already agreed to do this months prior, and that it was his subsequent refusal to do this that led to the outlay of resources by Plaintiffs’ counsel described in their Motion. Mot. at 4 & Rifkin Decl. ¶ 9–10. Mr. Bertling’s uncontested misconduct warrants intervention by this Court, including the imposition of sanctions significant enough that Defendants and their counsel will be deterred from further engaging in such behavior during the course of this

1 and other litigation pending before this Court.

2 **CONCLUSION**

3 Plaintiffs request that this Court order Defendants to immediately produce all
4 documents responsive to Plaintiffs' discovery requests to Defendants' expert Dr.
5 Hayward, and order that Dr. Hayward be recalled for an additional half-day of
6 deposition at Defendants' expense, including costs and attorneys' fees. Further,
7 Mr. Bertling's misconduct, the majority of which Defendants do not contest, and
8 the disregard he and Defendants have shown for the legal process, warrant
9 imposition of significant sanctions by this Court.

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11 Dated: December 1, 2015

Respectfully Submitted,

12 RIFKIN LAW OFFICE

13 HADSELL STORMER & RENICK LLP

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15 By: /s/ - Dan Stormer

16 Attorneys for Plaintiffs
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